

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)
)
CTV of Derry, Inc.)
) CSR-4859-N
Petition for Special Relief)

MEMORANDUM OPINION & ORDER

Adopted: September 23, 2003

Released: September 24, 2003

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. CTV of Derry, Inc., licensee of Television Broadcast Station WNDS (Channel 50), Derry, New Hampshire, filed the above-captioned petition for special relief requesting waiver of Section 76.151 of the Commission's rules¹ to permit Greater Worcester Cablevision, Inc., a subsidiary of Greater Media, Inc. – now represented by its successor in interest Charter Communications, Inc. ("Charter") – to carry WNDS' syndicated programming throughout its system without deletion. WLVI, Inc. ("WLVI"), licensee of television station WLVI-TV (Channel 56), Cambridge, Massachusetts, filed an opposition to CTV's petition. In addition, Charter filed comments at the request of CTV. CTV also filed a reply to WLVI's opposition and to Charter's comments.

II. BACKGROUND

2. Pursuant to Section 76.101 of the Commission's rules, television stations entitled to syndicated exclusivity protection may demand that cable systems located within the geographic zone for a syndicated program not carry the same syndicated programming broadcast by other television stations carried by the system.² When another television station carried by a cable system broadcasts programming to which another party holds a contract for exclusive rights to exhibit that programming, the cable operator must delete that programming.³ However, a broadcast signal is not required to be deleted

¹ Former Section 76.151, now Section 76.101, provides: Upon receiving notification pursuant to § 76.105, a cable community unit located in whole or in part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal, except as otherwise provided below. 47 C.F.R. § 76.101.

² With respect to each syndicated program, the "geographic zone" within which the television station is entitled to enforce syndicated exclusivity rights is the geographic area agreed upon between the program rights holder and the television station. The geographic zone is limited to the area in which the station has obtained territorial exclusivity rights as defined by 47 C.F.R. § 73.658(m), or if the station is part of a hyphenated market, to the area in which the station has obtained territorial exclusivity rights for each named community in that market. 47 C.F.R. § 76.101 (note).

³ The cable operator may, however, substitute a program from any other television broadcast station for that deleted program. 47 C.F.R. § 76.110.

from a cable community unit⁴ when that cable community unit falls within that signal's predicted Grade B contour.⁵ Our syndicated exclusivity rules exempt not merely communities which are entirely encompassed by the predicted Grade B contours of the signals in question, but also communities which are merely covered in part by a given signal's predicted Grade B contour.⁶

3. Charter's Central Massachusetts cable system is located in the Boston-Cambridge-Worcester-Lawrence, Massachusetts hyphenated television market.⁷ A number of Boston-area licensed broadcast stations, including WLVI, possess exclusivity rights to certain non-network programming within the Boston hyphenated market.⁸ WNDS places a predicted Grade B contour over certain Massachusetts communities served by Charter's cable systems. Pursuant to Section 76.106(a) of the Commission's rules, WNDS' syndicated programming carried on Charter's systems located within WNDS' predicted Grade B contour is exempt from deletion. However, according to the record, at the time of the petition, Charter deleted WNDS' duplicative syndicated programming throughout its entire Central Massachusetts system.

III. DISCUSSION

4. WNDS asks the Commission to waive Section 76.101 so that Charter may carry its signal throughout the Worcester area free from blackout requirements. WNDS states that it seeks the waiver because Charter has claimed that it is unable to configure its system to delete the station's signal in only those communities not covered by the station's Grade B signal without incurring significant expense and virtually re-engineering the system.⁹ Alternatively, WNDS seeks to require Charter to limit its deletions to the communities falling wholly beyond its predicted Grade B signal. The station argues that Boston-area stations do not have an expectation of exclusivity with respect to the communities encompassed by WNDS' predicted Grade B contour.¹⁰ WNDS proposes that this limitation, together with its assertion that its signal covered - at the time of its petition - fifty-seven percent of Charter's cable communities, makes it appropriate for the Commission to waive its rules to allow its signal to be carried by Charter without deletion. WNDS states that waiver of Section 76.101 would further the Commission's stated policy of fostering competition and program diversity.¹¹

⁴ A community unit is a cable television system, or portion of a cable television system, that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas). 47 C.F.R. § 76.5(dd).

⁵ 47 C.F.R. § 76.106(a).

⁶ *Id.*

⁷ 47 C.F.R. § 76.51(a)(6). The geographic limits for exclusivity under the Commission's rules are limited by the terms of the contractual agreement between the station and the holder of the rights to the program. *See* 47 C.F.R. § 76.101, note ("broadcast territorial exclusivity rights" as defined in 47 C.F.R. § 73.658(m)). The protected zone is the smaller of either the area of exclusivity provided in the contract or the 35 mile area surrounding the relevant reference point(s). *Id.* The maximum zone of protection allowed in a hyphenated market under the syndicated exclusivity rules is 35 miles surrounding each named city. *See* 47 C.F.R. § 76.101.

⁸ Petition at 3 and n. 4 (WLVI and WFXT); WLVI Opposition at 1.

⁹ Petition at 10.

¹⁰ *Id.* at 4, *citing KKTU, Inc.*, 6 FCC Rcd 3621, 3622 (1991) ("The rationale for this provision of the rules is that signals should not be subject to deletion from cable systems under the syndicated exclusivity rules in those situations where the station requesting the protection of the rules has no expectation of exclusivity. The practical availability of a signal from another station carrying the same programming eliminates this expectation.")

¹¹ *Id.* at 5, *citing Amendment of Part 73 and 76 of the Commission's Rule Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 5299, 5308 (1988) ("Program Exclusivity Order"), *reconsideration* (continued....)

5. WLVI opposes a waiver permitting Charter to carry WNDS' syndicated programming throughout its Central Massachusetts cable system without blackout. WLVI argues that it has paid a competitive price for programming based on the expectation of exclusivity in the Worcester area. WLVI states that it - and presumably other stations in the market - would not fully recoup its syndicated program investments if the Commission granted WNDS' requested relief.¹² In addition, WLVI states that its predicted Grade B contour covers more of Charter's Central Massachusetts system than does WNDS'. WLVI suggests that if Charter is unable to tailor its treatment of the stations' signals in accordance with the parties' respective rights, the equities favor maintaining the *status quo*.

6. Charter filed comments indicating that technical limitations prevented selective blackout for the communities within WNDS' predicted Grade B contour, and that it would either black out all, or carry all, of WNDS' duplicative syndicated programming. Charter opines that the Grade B exception in Section 76.106(a) is discretionary on the part of the operator, most likely due to the possibility of technical problems associated with partial blackouts.¹³

7. The record indicates that six communities that are part of Charter's Central Massachusetts cable system are encompassed by WNDS' predicted Grade B contour.¹⁴ These communities are Berlin, Boylston, Northborough, Southborough, West Boylston and Worcester. While WNDS asserts that its predicted Grade B contour encompasses part of Worcester, Charter and WLVI dispute this assertion. In support, WNDS cites our decision in *Greater Worcester Cablevision*,¹⁵ where we found in connection with a consolidated must-carry and market modification proceeding that WNDS' predicted Grade B contour encompassed Worcester. In its response to a request to update the record,¹⁶ Charter attempts to demonstrate that Worcester falls outside WNDS' predicted Grade B contour by providing a predicted Grade B contour map.¹⁷ We are unable to determine from this map whether WNDS' predicted Grade B contour encompasses Worcester in any part.¹⁸ As Charter argued in *Greater Worcester Cablevision*, it is the boundaries of the city, and not the printed name of the city on the map, that determines the measure of inclusion in a predicted Grade B contour map.¹⁹ The map provided by Charter does not indicate any city boundary lines. We do not have evidence in this record sufficient to counter our prior finding that Worcester is encompassed, in whole or in part, by WNDS' predicted Grade

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and clarification granted in part, 4 FCC Rcd 2711 (1989), stay denied, FCC 89-274 (Aug. 21, 1989), *aff'd*, 890 F.2d 1173 (D.C. Cir. 1989).

¹² Letter from Charles J. Sennet, Tribune Company, to Mary Beth Murphy, Chief, Policy Division – Media Bureau at 2 (May 9, 2003). We note that while WLVI asserts that it will be deprived of syndicated exclusivity rights, the record does not reflect if WLVI has contracted for such exclusivity in the Worcester area.

¹³ Charter Comments at 2.

¹⁴ Since the initiation of this proceeding, Charter acquired additional systems within WNDS' Grade B contour. These communities are served by a hub in Pepperell, Massachusetts. Charter is able to selectively control syndicated exclusivity blackouts in the communities served by this hub, and these systems are not at issue in this proceeding. Letter from Frederick W. Giroux to Mary Beth Murphy, Chief, Policy Division – Media Bureau at 2 (Aug 12, 2002) ("*Giroux Letter*").

¹⁵ 10 FCC Rcd 12569, 12572-73 (1995). *Greater Worcester Cablevision* did not provide conclusive evidence to support its claim that WNDS' Grade B signal did not reach Worcester.

¹⁶ Letter from Mary Beth Murphy, Chief, Policy Division – Media Bureau, to Joseph R. Riefer, Esq. (June 25, 2002).

¹⁷ *Giroux Letter*, at Attachment B (du Treil, Lundin & Rackley, Inc., Predicted Coverage Contour Map).

¹⁸ 47 C.F.R. § 76.101.

¹⁹ 10 FCC Rcd 12569, 12572 (1995).

B contour. We therefore include Worcester as one of the communities at issue.

8. In adopting the syndicated exclusivity rules, the Commission stated that: “where a cable system's viewers can receive, off the air, the signals of two or more broadcast stations . . . neither station will be permitted to invoke syndicated exclusivity rights against the programming of the other. . . . Thus, a broadcaster cannot contract for exclusive rights when it has no reasonable expectation of exclusivity in any case. . . . [W]hen a cable community unit falls, in whole or in part, within the predicted Grade B contour of a broadcast signal, . . . the cable community unit cannot be required to delete the signal.”²⁰ As thus stated, and as we held in *KKTV, Inc.*, Section 76.106(a) is not discretionary on the part of the cable operator.²¹ By its express terms Section 76.106(a) exempts WNDS from syndicated exclusivity blackouts in the above-named six communities.

9. Charter maintains that it is not technically feasible to selectively control blackout for the communities supplied by its Grafton headend.²² However, there is a presumption that cable operators are able to purchase the equipment necessary to comply with our rules.²³ As we stated in adopting the rules, “[a]lthough cable operators may have to make some changes to the way they do business, compliance costs will not be burdensome and, in any event, are outweighed by the benefits.”²⁴ Neither WNDS, nor Charter, has attempted to demonstrate that acquiring and installing the equipment to implement the deletions necessary under our rules would be infeasible or cost-prohibitive.²⁵ Mere speculation and unquantified arguments are not grounds for waiver of our rules.²⁶ Therefore, under our rules, WNDS is entitled to have its syndicated programming carried without blackout in the communities of Berlin, Boylston, Northborough, Southborough, West Boylston and Worcester, but is not so entitled in the communities outside the stations’ predicted Grade B contour.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, that the petition filed by CTV of Derry, Inc. is **GRANTED IN PART** and **DENIED IN PART**, to the extent discussed herein.

11. **IT IS FURTHER ORDERED** that Charter Communications **SHALL CARRY** WNDS’ syndicated programming **WITHOUT DELETION** in the communities of Berlin, Boylston, Northborough, Southborough, West Boylston and Worcester within sixty (60) days of release of this order.

12. This action is taken pursuant to authority delegated under Section 0.283 of the Commission’s rules.²⁷

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²⁰ *Program Exclusivity Order*, 3 FCC Rcd at 5315.

²¹ 6 FCC Rcd 3621 (1991).

²² *Giroux Letter*, at 2.

²³ See *King Videocable Company Prescott, Wisconsin*, 6 FCC Rcd 2218 (1991); *TCI Cablevision of Texas, Inc.*, 5 FCC Rcd 7168 (1990).

²⁴ *Program Exclusivity Order*, 3 FCC Rcd at 5313.

²⁵ In its August 12th letter, Charter provides a Syndex Blackout Configuration Diagram for its Oxford headend, but provides no further detail about its system or the equipment needed to implement community-specific blackouts.

²⁶ *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640, 5641 (1990).

²⁷ 47 C.F.R. § 0.283.

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